

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
CNZ Communications SE, LLC (Licensee of)	MB Docket No. 21-153
WGBP-TV, Opelika, Alabama))	
)	File No. CSR-8998-M
v.)	
)	
DIRECTV, LLC)	
)	

MEMORANDUM OPINION AND ORDER

Adopted: January 5, 2022

January 5, 2022

By the Senior Deputy Chief, Policy Division, Media Bureau:

I. INTRODUCTION

1. CNZ Communications SE, LLC (CNZ), licensee of full-power commercial television station WGBP-TV, Opelika, Alabama (WGBP or Station), filed the above-captioned complaint (Complaint) against DIRECTV, LLC,¹ pursuant to section 338 of the Communications Act of 1934, as amended (Act),² and sections 76.66(m)(3) and 76.7 of the Commission's rules, seeking mandatory carriage as a new television station in the Atlanta, Georgia Designated Market Area (DMA) on DIRECTV's systems during the current election cycle.³ AT&T Services, Inc., on behalf of its affiliate, DIRECTV (collectively, DIRECTV), filed an Answer to the Complaint to which WGBP filed a Reply.⁴ For the reasons discussed below, we find that WGBP is not a new television station in the Atlanta DMA eligible for mandatory carriage on DIRECTV's systems during the current election cycle, and thus we deny its Complaint.

II. BACKGROUND

2. Section 338 of the Act, adopted as part of the Satellite Home Viewer Improvement Act of 1999 (SHVIA),⁵ requires satellite carriers, beginning January 1, 2002, to carry on request all local

¹ *CNZ Commc'ns SE, LLC v. DIRECTV, LLC, Must-Carry Complaint Regarding Carriage of WGBP-TV Opelika, AL*, MB Docket No. 21-153, CSR-8998-M (rec. Apr. 8, 2021) (Complaint); see *CNZ Commc'ns SE, LLC v. DIRECTV, LLC Must-Carry Complaint Regarding Carriage of WGBP-TV Opelika, AL*, Public Notice, Special Relief and Show Cause Petitions, Report No. 0499, MB Docket No. 21-153 (Apr. 16, 2021).

² 47 U.S.C. § 338.

³ 47 CFR §§ 76.66(m)(3), 76.7.

⁴ *CNZ Commc'ns SE, LLC v. DIRECTV, LLC, Must-Carry Complaint Regarding Carriage of WGBP-TV Opelika, AL*, MB Docket No. 21-153, Answer of DIRECTV, LLC at 1 (rec. May 6, 2021) (DIRECTV Answer); *CNZ Commc'ns SE, LLC v. DIRECTV, LLC, Must-Carry Complaint Regarding Carriage of WGBP-TV Opelika, AL*, MB Docket No. 21-153, Reply of CNZ Communications SE, LLC (rec. Apr. 8, 2021) (WGBP Reply).

⁵ 47 U.S.C. § 338. See *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues; Retransmission Consent Issues*, Report and Order, 16 FCC Rcd 1918, 1934, para. 15 (2000) (SHVIA Order); *Implementation of the Satellite Home Viewer Improvement Act of 1999: Broadcast Signal Carriage Issues*, Order on Reconsideration, 16 FCC Rcd 16544 (2001).

television broadcast stations' signals in local markets in which the satellite carrier carries at least one local television broadcast signal pursuant to the statutory copyright license.⁶ A station's local market for satellite carriage purposes is its DMA, as defined by The Nielsen Company (Nielsen).⁷ Generally, a television station must request carriage by electing either retransmission consent or mandatory carriage with the satellite carrier serving its local market by October 1st of the year preceding each three-year carriage election cycle.⁸ However, a new television station may demand carriage during an election cycle, provided it demands such carriage between 60 days prior to commencing broadcasting and 30 days after commencing broadcasting.⁹ The Commission's rules state that "[a] television station providing over-the-air service in a market for the first time on or after July 1, 2001, shall be considered a new television station for satellite carriage purposes."¹⁰

3. WGBP is currently being carried by DIRECTV in the Columbus, GA (Opelika, AL) DMA, pursuant to the Station's mandatory carriage election filed on September 29, 2020 for the 2021-2023 election cycle.¹¹ Effective October 1, 2020, Nielsen changed the Station's DMA assignment from Columbus to Atlanta.¹² On December 9, 2020, the Station converted its facility to a distributed transmission system (DTS), which included locating a DTS transmitter near Warm Springs, GA, located in the Atlanta DMA.¹³ Prior to converting its facility to DTS, the Station was operating pursuant to its pre-repack channel 30 licensed DTV facility.¹⁴ On December 21, 2020, the Station sent DIRECTV a demand for mandatory carriage in the Atlanta DMA as a new television station.¹⁵ On February 1, 2021, DIRECTV sent a letter to the Station denying this request, saying the Station was not a new television station under the Commission's rules.¹⁶ After additional back and forth communications between the parties between February and April 2021,¹⁷ the Station filed the above-captioned complaint in April 2021.

⁶ 47 CFR § 76.66(a)(6). Pursuant to Section 338, satellite carriers are not required to carry local broadcast television stations; however, if a satellite carrier chooses to carry a local station in a particular DMA in reliance on the local statutory copyright license, it generally must carry any qualified local station in the same DMA that makes a timely election for retransmission consent or mandatory carriage. 47 U.S.C. § 338. This is commonly referred to as the "carry one, carry all" requirement. Satellite carriers have a statutory copyright license under SHVIA for carriage of stations to any subscriber within a station's local market. See 17 U.S.C. § 122.

⁷ See 17 U.S.C. § 122(j)(2); 47 CFR § 76.66(e) (defining a television broadcast station's local market for purposes of satellite carriage as the DMA in which the station is located).

⁸ 47 CFR § 76.66(c)(4).

⁹ *Id.* § 76.66(d)(3)(ii).

¹⁰ *Id.* § 76.66(d)(3)(i).

¹¹ Complaint at 2; Complaint Exh. A (WGBP's Initial 2021-2023 Election Notice).

¹² Complaint Exh. B (Letter from Daniel Monistere, SVP Policy & Guidelines, Nielsen, to CNZ, dated Dec. 22, 2020).

¹³ Complaint at 2; WGBP Reply at 3-4; see File No. 0000129713 (DTS license granted Dec. 22, 2020). We note that the Station was permitted to expand its coverage area through its DTS application because it was predicted to experience a loss in population served in excess of one percent as a result of the repacking process. See 47 CFR § 73.3700(b)(2)(ii).

¹⁴ See File No. BLCDD-20140827ABB (license granted Sept. 12, 2014).

¹⁵ See Complaint at 2-3.

¹⁶ See DIRECTV Answer at 8; Complaint, Exh. D (Letter from DIRECTV to David Nonberg, CNZ, dated Feb. 1, 2021).

¹⁷ WGBP and DIRECTV communicated further between February and April 2020, disagreeing on whether a new DTS transmitter "could be the basis for WGBP-TV asserting that it is a new station in the Atlanta DMA." Complaint at 3 (citing Complaint Exh. E (Email from Randy Nonberg, WGBP to Karen Griet, DIRECTV (Feb. 11,

(continued....)

III. DISCUSSION

4. We find the Station may not assert new carriage rights as a new station in the Atlanta market because it was providing over-the-air service in the Atlanta market at least as early as 2014, and did not become a new television station by virtue of the placement of its DTS transmitter in the Atlanta market. The issue presented in this case is whether WGBP is a new television station in the Atlanta market for satellite carriage purposes under section 76.66(d)(3)(i) of the Commission's rules.¹⁸ We find that it is not. In response to Commission Staff's request for clarification and additional information,¹⁹ the Station acknowledged that its pre-repack channel 30 licensed DTV facility (granted in 2014)²⁰ "did provide very limited service to the Atlanta DMA prior to December 2020."²¹ Nevertheless, the Station contends that this does not constitute service in the Atlanta DMA because prior to December 2020 the Station did not have a transmitter physically located within the Atlanta DMA.²² We disagree.

5. Where a transmitter is physically located is independent of the issue of where service is provided.²³ Section 76.66(d)(3)(i) expressly relates to the presence of a station's over-the-air service, not that of the station's transmitter.²⁴ The Commission defines a DTV station's service area as the geographic area within its noise-limited contour where its signal strength is predicted to exceed the noise-limited service level.²⁵ Thus, a station is considered to be providing over-the-air service in areas encompassed by that station's noise-limited service contour (NLSC). Section 76.66(d)(3)(i) requires us to consider whether a television station is "providing over-the-air service in a market for the first time on or after July 1, 2001."²⁶ Thus, the relevant consideration here is when did the station's NLSC cover areas in the market at issue for the first time. Based upon Commission Staff's review of the Station's pre-repack channel 30 licensed DTV facility, we have determined that this facility's NLSC encompassed areas in the

2021)); Complaint Exh. F (Email from Karen Griet, DIRECTV, to Randy Nonberg, WGBP (Mar. 9, 2021)); Complaint Exh. G (Email from Karen Griet, DIRECTV, to Karsten Amlie (Mar. 9, 2021)); DIRECTV Answer at 8 (citing Complaint Exh. D (Letter from DIRECTV to David Nonberg, CNZ (Feb. 1, 2021)); DIRECTV Answer Exh. C (March and April 2021 email discussing carriage).

¹⁸ See 47 CFR § 76.66(d)(3)(i).

¹⁹ Letter from Steven Broecker, Senior Deputy Chief, Policy Division, Media Bureau, FCC, to Randy E. Nonberg, Manager, CNZ Communications SE, LLC (Sept. 2, 2021) (on file in MB Docket No. 21-153).

²⁰ See BLCDDT-20140827ABB (license granted Sept. 12, 2014).

²¹ Letter from Randy E. Nonberg, Manager, CNZ Communications SE, LLC at 3 (Sept. 9, 2021) (on file in MB Docket No. 21-153) (*CNZ Letter*). We note that the complaint appeared to imply that December 9, 2020 was the first time the Station's over-the-air service extended into the Atlanta DMA. See Complaint at 6 (stating "While the primary purpose of the DTS here was to replace the coverage area the Station lost in the post-Incentive Auction transition, doing so required both adding a transmitter in the Atlanta DMA and extending the Station's over-the-air service into the Atlanta DMA."). See *infra* note 28 (conceding that WGBP provided service to a portion of the Atlanta DMA prior to activating its DTS system).

²² See *CNZ Letter* at 2-3 (stating "The Station began providing over-the-air service in the Atlanta DMA in 2020 when it initiated service using a transmitter in Warm Springs, GA, which is located in the Atlanta DMA.").

²³ We note, for example, that WHSV-TV for many years provided service to viewers in its community of license of Harrisonburg, VA (in the Harrisonburg, VA DMA) using a transmitter located in the Washington, DC (Hagerstown, PA) DMA. Similarly, WXEL-TV, Boynton Beach, FL, is the PBS station for the West Palm Beach, FL-Ft. Pierce, FL DMA but uses a shared transmitter located in the Miami, FL DMA belonging to a Miami host station.

²⁴ The Station contends that the phrase "in a market" "refer[s] to a physical presence within a market." *CNZ Letter* at 2. We agree, but the rule applies that phrase to the provision of service and not to the location of a transmitter. See 47 CFR § 76.66(d)(3)(i) (referring to a television station "providing over-the-air service in a market").

²⁵ 47 CFR § 73.622(e). This is commonly referred to as the noise-limited service contour or NLSC.

²⁶ *Id.* § 76.66(d)(3)(i).

Atlanta market (for example, at least part, if not all, of Troupe County).²⁷ The Station in its clarification letter essentially concedes this much.²⁸ Thus, we find that the Station was providing over-the-air service in the Atlanta market at least as early as 2014, and did not become a new television station in the Atlanta market on December 9, 2020 by virtue of the placement of its DTS transmitter in the Atlanta market.²⁹ Accordingly, because the Station is not a new television station in the Atlanta market (and no other exception applies³⁰), it may not assert new carriage rights in that market in the middle of an election cycle.³¹

6. Additionally, the Station contends that, even if we determine (which we have) that the Station was providing service in the Atlanta DMA before December 9, 2020, the provision of “this service was *de minimus* and should be disregarded.”³² We observe, however, that the rule does not provide for any such exception for *de minimus* service.³³ To the extent the Station is seeking a waiver in this regard, such a request is not appropriate in a complaint proceeding and cannot be addressed here.³⁴ We recognize that the issue of the Station’s correct market may arise in the next election cycle, commencing January 1, 2023. Based on the Station’s present Nielsen DMA assignment in the Atlanta

²⁷ See BLCDDT-20140827ABB (license granted Sept. 12, 2014).

²⁸ See *CNZ Letter* at 3 (stating “the Station did provide very limited service to the Atlanta DMA prior to December 2020. Specifically, the over-the-air service that the Station provided in the Columbus DMA was not entirely contained within the Columbus DMA, but extended north to a small portion of the Atlanta DMA....”).

²⁹ We note that a DTS station’s authorized service area is defined as “the area within its predicted noise-limited service contour determined using the facilities authorized for the station in a license or construction permit for non-DTS, single-transmitter-location operation,” 47 CFR § 73.626(b), and the Table of Distances “describes (by channel and zone) a station’s maximum service area that can be obtained in applying for a DTS authorization and the maximum interference area that can be created by its facilities,” *id.* § 73.626(c). As an alternative to the Table of Distances approach for determining the hypothetically maximized service area, full-power DTS stations may use the “largest station” provision in section 73.622(f)(5) of the rules. 47 CFR § 73.622(f)(5). Regardless of the approach, the placement of individual DTS transmitters does not extend the provision of service beyond a DTS station’s maximized service area. *See id.* § 73.626(d)-(e). That is, the coverage of individual DTS transmitters are only relevant to show the provision of service *within* the DTS station’s maximized service area. In addition, we note that an individual DTS transmitter does not, in and of itself, serve as a basis for mandatory carriage rights. Rather, carriage rights are based on the station’s non-DTS, single-transmitter facility and the station’s DMA assignment. *See, e.g., Rules Governing the Use of Distributed Transmission System Technologies, Authorizing Permissive Use of the “Next Generation” Broadcast Television Standard*, MB Docket No. 20-74, GN Docket No. 16-142, Report and Order, 36 FCC Rcd 1227, 1243, para. 27 n.109 (2021) (noting that the DTS rules “do not, in and of itself, do anything to change a station’s carriage rights” and stating “stations will continue to enjoy all the rights they have, or could pursue, today by increasing coverage through the use of a single-transmitter facility”).

³⁰ *See* 47 CFR § 76.66(c)(6), (d)(2).

³¹ *Id.* § 76.66(c)(4). Indeed, the Media Bureau has found that the Commission’s satellite broadcast signal carriage rules do not allow an existing station to make a carriage election based on a mid-cycle change in its DMA assignment. *See TV34, Inc. v. EchoStar Communications Corp. Order*, Memorandum Opinion and Order, 20 FCC Rcd 8747, 8748-49, para. 4 (MB 2005) (*TV34 v. EchoStar*); *see also* DIRECTV Answer at 11; WGBP Reply at 4-5 (stating, “If CNZ had simply sent a letter to DIRECTV stating that Nielsen had reassigned WGBP to the Atlanta DMA as of October 1, 2020, then DIRECTV would be correct that this would not have altered DIRECTV’s carriage obligations until the next election cycle. But the basis for CNZ’s election letter and WGBP’s new station status was the Station’s commencement of over-the-air service in the Atlanta DMA, not its assignment by Nielsen.”).

³² *CNZ Letter* at 3.

³³ *See* 47 CFR § 76.66(d)(3).

³⁴ *See TV34 v. EchoStar*, 20 FCC Rcd at 8749, para. 5; DIRECTV Answer at 11.

DMA,³⁵ and the fact that its community of license of Opelika, AL is in the Columbus, GA (Opelika, AL) DMA, we agree with the Station that it could assert mandatory carriage rights in both the Atlanta and Columbus markets.³⁶

IV. ORDERING CLAUSE

7. Accordingly, **IT IS ORDERED**, that pursuant to section 338 of the Communications Act, as amended, 47 U.S.C. § 338, and section 76.66 of the Commission's rules, 47 CFR § 76.66, the mandatory carriage complaint filed by CNZ Communications SE, LLC, licensee of WGBP-TV, Opelika, AL, is **DENIED**. This action is taken pursuant to the authority delegated in section 0.283 of the Commission's rules, 47 CFR § 0.283.

FEDERAL COMMUNICATIONS COMMISSION

Steven Broecker
Senior Deputy Chief, Policy Division, Media Bureau

³⁵ DIRECTV argues that Nielsen's reassignment of the Station from the Columbus, GA (Opelika, AL) DMA to the Atlanta, GA DMA seems inconsistent with its understanding of Nielsen's DMA assignment policy. *See* DIRECTV Answer at 21; The Nielsen Company, Local Reference Supplement at page 6-3 (Dec. 2020). In this regard, we note that the Station's authorized service area provides more coverage and service in its current DMA, its market of origin, than its reassigned DMA. Because we conclude that the station is not new to the Atlanta DMA, and we recognize that Nielsen may have other reasons for making this reassignment, this proceeding is not the appropriate venue to pursue these considerations. However, we encourage DIRECTV to pursue its concerns regarding this reassignment directly with Nielsen.

³⁶ *See SHVIA Order*, 16 FCC Rcd at 1934-35, para. 36; WGBP Reply at 7. We acknowledge, as DIRECTV observes, that carriage of the Station throughout the Atlanta DMA, which would include some communities more than 100 miles from its community of license, may raise localism concerns. DIRECTV Answer at 2 (observing that "Complainant's demand for carriage throughout the Atlanta DMA has nothing to do with improved service to its local community, Opelika, Alabama, which is nearly 100 miles away from Atlanta."). We note that DIRECTV may file a satellite market modification petition to modify the local television market of the Station to exclude from the Station's market those satellite communities (counties) in the Atlanta DMA to which the Station has no local connection. *See* 47 CFR § 76.59; *see also CoxCom, LLC for Modification of the Market of WMDE, Dover, Delaware*, MB Docket No. 15-120, Memorandum Opinion and Order, 30 FCC Rcd 10978 (MB 2015).